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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAY 1 8 1994

In the Matter of

Amendment of the Commission's
Rules to Provide Exclusivity to
Qualified Private Paging Systems
at 929-930 MHz)
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)FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

PR Docket No.93-35

RM-7986

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To: The Commission

REPLY COMMENTS OF COMMUNICATION INNOVATIONS CORPORATION

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Communication Innovations Corporation ("CIC"), by its attorney, respectfully submits these late filed reply comments 1/ in response to the petitions for reconsideration 2/ filed concerning the Commission's Report and Order in the

1/ By Public Notice, FCC Report Mimeo No. 1999 (March 1, 1994), Reply Comments were due within 25 days of the date of Federal Register publication. This occurred March 16, 1994. 59 Fed. Reg. 12327. Consequently, Reply Comments were due April 11, 1994. As CIC's Reply Comments are over one month late, CIC respectfully requests that they be considered to be late filed comments. CIC has served copies of its Reply Comments on all of the Petitioners, and, of course, would not object to their responses, if any.

2/ Nine parties filed Petitions for Reconsideration and/or Clarification: Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. ("NABER"); Paging Network, Inc.; First National Paging Company, Inc.; Metrocall, Inc.; MAP Mobile Communications, Inc.; Carl N. Davis dba Afro-American Paging; American Mobilphone, Inc.; Pactel Paging; and Arch Communications, Inc.

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above captioned proceeding. ^{3/} This proceeding adopted rules to grant channel exclusivity to qualified local, regional, and national private paging ("private carrier paging" or "PCP") systems in the 929 -- 930 MHz band. CIC supports the Commission's Report and Order, but generally agrees with petitioner American Mobilphone ("AMI") that the arbitrary date chosen to determine frequency exclusivity and system classification has produced capricious results and should be reconsidered or clarified.

Identity of Commentator

In 1990, Motorola, Inc. purchased Contemporary Group, Inc. ("CGI"), one of the three original Network Organizers licensed to provide common carrier 900 MHz Nationwide Paging Service throughout the United States. A year later two former senior officers of Contemporary founded CIC and repurchased the residual assets and radio licenses of CGI. Their goal was to realize a business vision, formed while with CGI, of a broadly offered, consumer orientated paging service -- "Personal Paging".

To accomplish this, a nationwide frequency was required in order to insure commonality of service and the standardization of inexpensive pagers, which will be sold at retail.

After unsuccessful negotiations to secure either a strategic business partner, or to purchase an existing

^{3/} 8 FCC Rcd 8318 (1993), 58 Fed. Reg. 62289 (November 26, 1993); Notice of Proposed Rulemaking, 8 FCC Rcd 2227 (1993) ("Notice").

nationwide PCP system, 4/ CIC began in April 1993 to prepare applications for its own nationwide system. 5/ To date, CIC has filed applications for 328 transmitter 6/ sites and is considered by NABER to be the Nationwide Paging licensee on frequency 929.8125 MHz. 7/

Filing History

Completed by the Licensing Assistance Office ("LAO"), CIC's applications were systematically prepared for, and coordinated by, NABER in four "batches" throughout the Summer and Fall of 1993. NABER received from LAO applications for

4/ CIC attempted to purchase the existing nationwide paging network of Metagram America, Inc. These negotiations were unsuccessful and Metagram was sold on April 5, 1993 to MAP Mobile Communications.

5/ On February 18, 1993, when the Commission adopted the Notice of Proposed Rulemaking in this proceeding, it imposed a freeze on all new applications at 929-930 MHz. 8 FCC Rcd at 2233. On April 6, 1993 the Commission released an Order lifting the freeze. 8 FCC Rcd 2460. CIC began preparing its applications immediately thereafter.

6/ CIC has filed with the FCC 62 applications for 328 sites. Of these, 52 applications for 270 sites have been granted, and 10 applications for 58 sites remain pending. As CIC anticipates that its nationwide network will ultimately require in excess of 800 transmitter sites, additional applications will be submitted soon.

CIC also has licenses for the Multipoint Distribution Service ("MDS") and for nationwide temporary fixed multiple frequency point-to-point microwave.

7/ Although recognized by NABER as the Nationwide licensee, CIC shares this frequency with (among others) Mercury Messenger Service and AMI. Mercury Messenger is a local paging licensee in Washington, DC and Baltimore, MD. AMI has "grandfathered" regional exclusivity in the Southeastern part of the country. AMI filed its applications with NABER on May 18, 1993. As will be seen, CIC began filing its applications with NABER one month later on June 14. AMI is the only other regional system on this frequency and the other users are non-exclusive local systems.

226 sites on June 14; applications for 36 sites on August 13; applications for 48 sites on October 14; and applications for 18 sites on October 28.

In turn, NABER filed these applications with the Commission in the following general order: in July, 25 applications were filed for 122 sites; in September, 19 applications were filed for 100 sites; in October, 9 applications were filed for 54 sites; and in March 1994, 9 applications were filed for 52 sites.

Included with this last filing were 6 applications for 34 sites in Los Angeles, CA; San Diego, CA; Nashville, TN; Baltimore, MD; and Washington, DC.

Although originally part of the first "batch" of applications NABER received in June 1993, NABER was unable to coordinate them because of its "eight month rule". 8/

8/ Prior to the Notice in this proceeding, PCP frequencies were available, and were applied for, on a shared basis only and were "not be assigned for the exclusive use of any licensee". 47 CFR § 90.173. However, the Notice proposed that "conditional exclusivity would commence when the applicant's proposed system is assigned a frequency and would extend for eight months following initial licensing". Para. 30, 8 FCC Rcd at 2231. Left unclear was who, and when, a frequency was considered to be assigned.

The Notice froze acceptance of PCP applications (Id. at 2233), but the Order lifting the freeze stated:

The existing rules, we wish to emphasize, require all 900 MHz private paging frequencies to be shared and all licensees to cooperate in the selection and use of frequencies to minimize interference with each other. We expect all parties in the application and coordination process to continue complying fully with these requirements while this proceeding is pending. 8 FCC Rcd 2460 (1993).

Nevertheless, NABER adopted an internal "eight month rule", under which protection from co-channel interference would

They were returned in August, resubmitted to NABER on October 28, 1993, and were finally filed with the FCC on March 25, 1994.

From the outset, all of these applications specified one common national frequency and all were coordinated by NABER as being part of one Nationwide Paging system.

Finally, NABER received on January 28, 1994, CIC's requests for regional and nationwide exclusivity. NABER approved (and forwarded to the FCC) CIC's regional request on March 3 and its nationwide request on April 7, 1994.

CIC's Dilemma

CIC filed its request for regional exclusivity in order to protect its frequency rights on the East Coast, and not because it wished to be a regional carrier. As of October 14, NABER had received applications for 310 sites, of which 222 had been granted by, or filed with, the Commission. Since NABER had not completed the filing for the required 300+ sites, CIC could not qualify for grandfathered nationwide frequency exclusivity as of that date.

Instead, CIC discovered that it qualified for regional

begin immediately after frequency coordination by NABER and extend for eight months after the FCC licensed the station. See, NABER Petition for Rule Making, RM-7986 Pg. 11 fn. 19 (filed April 24, 1992). That is, interference protection would begin immediately after internal assignment of a frequency by NABER. This meant that NABER effectively precluded sharing during the pendency of this Rulemaking, because co-channel applications could not be filed with the FCC without NABER's coordination.

If these 6 applications had not been returned, CIC would have had on file, with the FCC, applications for 310 transmitter sites by the end of October 1993.

exclusivity for a system that would encompass most of the Eastern half of the country. But CIC's sites in the Western states were left essentially in a regulatory limbo, not being eligible for "grandfathered" local, regional, or nationwide exclusivity as of that date.

Hence CIC's dilemma: how does a company offer a national consumer paging service when it has not secured its common nationwide frequency?

In hindsight, it is difficult to see how CIC or NABER could have avoided this dilemma. CIC's filing strategy was straight forward: it was based upon the systematic filing of the applications necessary to establish its eligibility for a nationwide frequency.

The Notice proposed to grant nationwide exclusivity to systems which consisted of at least 300 transmitters, provided service to 50 markets (including 25 of the top 50 markets), and served at least two markets in each of seven regions modelled on the RBOC regions. ^{9/} In contrast to the requirements for regional exclusivity, the Notice did not propose that nationwide licensees operate in adjacent states, or construct in the top 30 markets enough contiguous transmitters to meet the criteria for local exclusivity in those markets. ^{10/} Consequently, CIC did not realize that its filing strategy for nationwide eligibility should have been

^{9/} Notice at paras. 25-27, 8 FCC Rcd at 2230-2231.

^{10/} Notice at para. 24, 8 FCC Rcd at 2230.

based upon a combination of, say, 5 regional systems, each of which qualified for both regional and local exclusivity, so as to guarantee national access to a common frequency.

Moreover, there was no way that NABER could have known that CIC's nationwide applications had to be coordinated and filed by October 14, 1993, the Sunshine Notice date for the Report and Order. ^{11/} Afterall, the Order which lifted the filing freeze made no mention of a "cut off" date for new applications. Indeed, it invited the filing of new applications by refusing to adopt a partial rollback of the freeze which would benefit only existing licensees. ^{12/}

The Arbitrary Eligibility Date

In its "Petition for Partial Reconsideration", AMI ably argues that the selection of this date without prior notice was arbitrary, capricious and in probable violation of the Administrative Procedure Act. ^{13/}

CIC agrees with and supports these arguments with two additional observations. First, the more logical "cut off" date would be based upon the effective date of the new rules, i.e., thirty days after publication of the Report and Order in the Federal Register. ^{14/} Indeed, the Report and Order declared:

The rights of incumbents would be based on their

^{11/} Report and Order at para. 31, n.64, 8 FCC Rcd at 8329.

^{12/} Order at para. 3, 8FCC Rcd 2460 (1993).

^{13/} AMI Petition for Partial Reconsideration at 4-8.

^{14/} See, 47 C.F.R. § 1.427 (a).

existing authorizations, whether constructed or unconstructed, as of the effective date of the rules. With respect to applications for new transmitter sites once the new rules are in effect, we propose that incumbents and new licensees would be treated equally, except that a preference would be granted in favor of expansion of existing systems in mutually exclusive situations. ^{15/}

The effective date of the rules is thirty days after their publication in the Federal Register. ^{16/} The Sunshine Notice is only a public announcement that proposed regulations are going to be considered by the FCC's Commissioners. ^{17/} The Sunshine Notice is not an announcement of the adoption of new rules, let alone a discussion of their substance. The release of a Report and Order announces the rules and their publication in the Federal Register determines their effective date.

Consequently, the effective date of the rules is the more logical basis for determining a "cut off" date for applications desiring grandfathered exclusivity. In this case, the Federal Register publication date was November 26, 1993, and the effective date of the rules was December 27. This date is so close to the end of the calendar year that CIC suggests that the "cut off" date should be January 1, 1994.

Secondly, the Commission should recognize that applications in the process of being coordinated by NABER as of the "cut off" date are not speculative applications filed in

^{15/} Report and Order at para. 29, 8 FCC Rcd at 8328.

^{16/} Report and Order at para. 49, 8 FCC Rcd at 8335.

^{17/} 47 C.F.R. § 1.1202 (f).

response to the rumored announcement of new rules. 18/

NABER is the sole frequency coordinator for PCP, a role reaffirmed by the Report and Order. 19/ The rules require that all 929-930 MHz applications contain a statement from NABER recommending the most appropriate frequency. 20/ Those recommendations are almost always followed. Indeed, an applicant who has been coordinated may begin operations immediately after NABER has filed his application with the FCC. 21/

Thus, it is logical that applications in the process of being coordinated by NABER should be considered "in the pipeline" as of the "cut off" date. 22/ For purposes of an eventual determination of system eligibility, these applications would be retroactively counted if they were successfully coordinated by the time the regional or nationwide exclusivity request was filed. In other words, if an application was being processed by NABER as of a "cut off" date, and if that application was successfully coordinated by

18/ In this regard, the Commission apparently can not decide which is worse: "old speculators" who have grandfathered licenses, but no slow-growth options; or "new speculators" who have a slow-growth option, but can not obtain frequencies.

19/ Report and Order at paras. 40-42, 8 FCC Rcd at 8332-8333.

20/ 47 C.F.R. § 90.175 (c).

21/ 47 C.F.R. § 90.159 (b).

22/ As part of the coordination process, NABER date stamps and assigns a unique control number to every application. There is no question of being able to identify applications filed with NABER before a "cut off" date.

the time the exclusivity request were filed, that application would be considered to have been filed at FCC as of the "cut off" date when a determination of exclusivity is made. Certainly, it is not logical to argue, as in CIC's case, that applications NABER managed to coordinate by October 14 are more eligible for exclusivity than those applications coordinated the day after, particularly when a national paging system is being systematically filed for. ^{23/}

Conclusion

In conclusion, CIC agrees with AMI that the arbitrary date chosen to determine frequency exclusivity and system classification has produced capricious results and should be reconsidered. As CIC's filing history illustrates, the unanticipated selection of this date has seriously disrupted the systematic preparation and filing of a nationwide paging system. Moreover, the date selected is not a logical choice. If there must be a "cut off" date, it should be based upon the publication date of the Federal Register. Finally, CIC believes that applications being coordinated by NABER be considered in any determination of grandfathered exclusivity.

^{23/} If this were a logical argument, then the fact that the Columbus Day holiday took place October 12 would be relevant because some of NABER's Frequency Coordinators may have chosen to take the rest of the week off so as to not have been available to process CIC's applications.

CIC understands from NABER that we are the only Nationwide applicant whose applications were hung up by the unexpected imposition of the October 14 "cut off" date.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all parties listed above by U.S.P.O. First Class Mail (postage prepaid), or by Hand Delivery, this 18th day of May 1994.


Richard O. Pullen

*Served by Hand Delivery.